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FEDERAL AGENCY COMPENSATION OF INTERVENORS

Robert M. Steeg*

I. INTRODUCTION

Federal administrative agencies are vitally important guardians of the quality of our environment and the efficiency of our use of natural resources.¹ Ideally, these agencies are intended to function as disinterested bodies of experts serving the public.² Although some may contend that the agencies perform this task well, the overwhelming weight of opinion is to the contrary.³ Federal administrative regulation, including that covering environmental affairs, often does not reflect vigorous, continuing consideration of the needs and concerns of the general public.

Increased participation in the administrative process by members of the public is frequently heralded as a means of stimulating more responsive administrative decision-making.⁴ Both Congress⁵ and the

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¹ Some agencies, such as the Federal Power Commission, the Environmental Protection Agency, and the Nuclear Regulatory Commission deal exclusively with such matters. Moreover, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970), directs all federal agencies to include consideration of the values of environmental preservation in their decision-making.

² See R. NOLL, *REFORMING REGULATION* 33-39 (1971).

³ Compare *Hearings on S. 2715 Before the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 21 (testimony of Joseph Swidler) and 45 (testimony of William Cuddy) (1976) [hereinafter cited as *Operations Hearings*] with *Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 94th Cong., 2d Sess. 2 (remarks by Sen. Kennedy) (1976) [hereinafter cited as *Administrative Hearings*]; Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972) [hereinafter cited as Gellhorn]; Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972) [hereinafter cited as Cramton]; and Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391, 392-93 (1976) [hereinafter cited as Murphy & Hoffman].

⁴ Gellhorn, *supra* note 3, at 361; Cramton, *supra* note 3, at 527-30.

courts⁶ have recognized the importance of increased participation, and federal administrative agencies, responding to pressure from these two quarters, have in recent years provided greater opportunity for public intervention in their proceedings.⁷

Many potential intervenors, however, are financially unable to participate.⁸ The costs of doing so are great,⁹ especially the fees for attorneys and expert witnesses.¹⁰ External sources of funds to meet these costs are limited. Foundations generally provide only "seed money" for selected projects,¹¹ while private donations or group membership fees are extremely difficult to raise and to maintain.¹²

As long as public intervenors remain financially foreclosed from participation, their potential contribution to the quality of administrative decision-making will remain unrealized. Several methods are now being proposed for increasing the representation of the general public before federal agencies, including: agency cost-shifting, intra-agency public representation, a federal public advocacy agency, legal aid programs for intervenors, and agency compensation of intervenors.¹³

This article provides a brief analysis and comparison of these various methods of increasing public representation, and concludes that direct agency compensation of intervenors appears to be the most promising. The major issues raised by this alternative are then examined in detail. The examination focuses on the development of comprehensive legislation to guide federal agency compensation of

⁶ See *Administrative Hearings*, *supra* note 3, at 271-73 (bibliography of congressional hearings on public participation in federal agency proceedings).

⁷ *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966); see *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1964), *cert. denied*, 384 U.S. 941 (1966).

⁸ Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815, 1817-18 (1975) [hereinafter cited as *Agency Assistance*].

⁹ See *Administrative Hearings*, *supra* note 3, at 37-38 (testimony of Phillip Sparks and Diane Worthington); Citizens VOICE, *Facilitating Public Participation at the Federal Power Commission* 12-15, 26-30 (1976), reprinted in *Administrative Hearings*, *supra* note 3, at 471, 483-86, 497-501 [hereinafter cited as *Citizens VOICE Report*].

¹⁰ Gellhorn, *supra* note 3, at 389-99; Cramton, *supra* note 3, at 538-41. A utility company typically pays an estimated \$250,000 to carry through a licensing proceeding at the NRC. *Administrative Hearings*, *supra* note 3, at 52 (testimony of Tersh Boasberg).

¹¹ *Agency Assistance*, *supra* note 7, at 1819. The use of one expert witness at an FPC ratemaking proceeding can "easily" cost \$10,000 to \$20,000. Citizens VOICE Report, *supra* note 8, at 55.

¹² COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA*, 221, 226-44 (1976).

¹³ *Id.* at 221, 244-61.

¹⁴ See Part III, *infra*, for a discussion of these methods.

intervenors,¹⁴ with particular reference to one such proposal, S. 2715,¹⁵ a bill which reached the floor of the Senate in July, 1976, but was not voted upon before the close of the legislative session in October. S. 2715 represents Congress' starting point on agency compensation of intervenors. Its proponents introduced similar legislation as soon as the Senate reconvened in January, 1977.¹⁶

II. THE BENEFITS OF PUBLIC PARTICIPATION

Essential to the analysis which follows is an understanding of what public participation contributes to the administrative process. One possible benefit¹⁷ is that a widespread increase in such participation might boost flagging public confidence¹⁸ in administrative decision-making. Yet because the general public is often unaware of who has participated in administrative decisions,¹⁹ it is unlikely that any nationwide effect on public confidence would be felt.

A second possible benefit is that the very presence of public intervenors may incline agency staffs to be more thorough in their analyses and may cause agency decision-makers to articulate more clearly and precisely the reasons for their decisions.²⁰ However, such effect would be minimal whenever agencies are already attempting to make careful, clear decisions. Further, the effect on a recalcitrant agency will depend on how intervention is actually structured into agency decision-making.²¹

¹⁴ Individual agencies, acting either under congressional direction or upon their own initiative, might attempt to implement the agency compensation concept. The analysis conducted here is applicable to the design and evaluation of any such system of agency compensation.

¹⁵ S. 2715, 94th Cong., 2d Sess. (1976). The bill was introduced by Senator Edward Kennedy and cosponsored by 16 other senators. It was favorably reported out of the Senate Judiciary Committee, S. REP. No. 94-863, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Committee Report*]. The Senate Government Operations Committee considered it without objection, and it was ordered to be placed on the calendar July 2, 1976.

¹⁶ S. 270, 95th Cong., 1st Sess. (1977). As of this writing, S. 270 resolves the major issues concerning agency compensation which are discussed in Part IV, *infra*, in substantially the same manner as did its predecessor, S. 2715. In some instances, S. 270 contains refinements or additions which successfully resolve some of the problems raised in this article.

¹⁷ Gellhorn, *supra* note 3, at 361.

¹⁸ *Committee Report*, *supra* note 15, at 2; see Boasberg, Hewes, Klores & Kass, *Report to the Nuclear Regulatory Commission: Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings* 103 (1975), reprinted in *Administrative Hearings*, *supra* note 3, at 331, 391 [hereinafter cited as *Boasberg Report*].

¹⁹ *Id.* at 104.

²⁰ *Id.* at 96-100; Jacks, *The Public and the Peaceful Atom: Participation in AEC Regulatory Proceedings*, 52 TEX. L. REV. 466, 502-03 (1974).

²¹ See Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*,

A third possible benefit consists of the substantive recommendations of public participants. There are two elements of this contribution. First, public participants bring important factual information to the decision-maker's attention, either through presentation of original evidence or cross-examination of other parties' witnesses. The information may concern either an existing issue or one raised by the public participant. For example, an intervenor's disclosure that a developer planned to build a community for 30,000 people within two miles of the proposed site of a nuclear power plant prompted the Atomic Energy Commission to withdraw its initial approval of the site.²² Similarly, after two public interest groups uncovered several studies showing that the cost of refining unleaded gasoline is about the same as that of refining regular gasoline, the Federal Energy Administration substantially altered its regulation permitting refiners to sell unleaded gasoline at premium prices.²³ One agency commissioner recently attested to the value of such contributions: "In hearing after hearing, the industry provides technical witnesses who can persuasively argue their position. This evidence I consider to be important, but it is incomplete. It must be supplemented and balanced by technical arguments made by the public."²⁴

The second major element of public participants' substantive contribution is the presentation of a viewpoint or perspective not otherwise available to the decision-maker. That is, a legal or factual argument is presented which places a unique emphasis or interpretation on either existing or newly-raised issues. For example, in 1963 the Scenic Hudson Preservation Conference urged the Federal Power Commission to consider aesthetic values and harms in a licensing proceeding. The group's right to present such a perspective was eventually vindicated by a federal court of appeals.²⁵ Similarly, in the Federal Trade Commission's recent hearings on private vocational schools, a California consumer group presented testimony reflecting an "intimate and first-hand familiarity" with the problem

15 WM. & MARY L. REV. 503, 516 (1974).

²² Jacks, *supra* note 20, at 503.

²³ *Hearings on Implementation of the Emergency Petroleum Allocation Act of 1973 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 23 (1975) (testimony of Peter Shuck).

²⁴ *Administrative Hearings*, *supra* note 3, at 92 (testimony of David Pittle, Commissioner, Consumer Product Safety Commission).

²⁵ *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1964), *cert. denied*, 384 U.S. 941 (1966).

being examined by the agency—a perspective which the Commission staff could not possess.²⁶ An FTC official recognized the importance of intervenors who have had “a different *perspective* which made different information relevant. . . . the analysis produced by this additional *point of view* is as important as anything else.”²⁷

Clearly the presentation of information and viewpoints constitutes public participants’ primary contribution to administrative proceedings. Any method for increasing public participation must be designed to foster these specific benefits.

III. ALTERNATE METHODS OF INCREASING PUBLIC PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS

A. Agency Cost-Shifting

One means²⁸ of increasing public participation is for agencies to require that the costs of such participation be borne by the other parties in an administrative proceeding, in a manner analogous to the judicial practice of involuntary fee-shifting. Traditionally, federal courts have departed from the American rule against fee-shifting only in the following select situations: the plaintiff has secured a ruling which works to the direct financial advantage of persons in addition to himself; the defendant has been drawn into a lawsuit brought or conducted in bad faith; or the plaintiff has acted as a private attorney general, vindicating important public policies through private litigation.²⁹

Seldom in administrative proceedings is either a common financial benefit created or a participant’s bad faith so clear as to justify cost-shifting. Thus, only the private attorney general rationale seems of practical significance.³⁰ However, the Supreme Court re-

²⁶ *Administrative Hearings*, *supra* note 3, at 8 (testimony of Elizabeth Lederer).

²⁷ *Operations Hearings*, *supra* note 3, at 32 (testimony of James DeLong, Assistant Director for Special Projects, Bureau of Consumer Protection, Federal Trade Commission) (emphasis added).

²⁸ The methods discussed here are comprehensive, large-scale programs. Other means which are aimed at reducing specific kinds of administrative costs—*e.g.*, transcript costs—are not discussed here. Such specific proposals are discussed in Gellhorn, *supra* note 3, at 390-93; Cramton, *supra* note 3, at 539-41.

²⁹ See *Defrosting the Alyeska Chill: The Future of Attorneys Fees Awards In Environmental Litigation*, 5 ENV. AFF. 297, 315-25 (1976).

³⁰ *Agency Assistance*, *supra* note 7, at 1823-24, which briefly raises and dispenses with two other theories which might guide administrative cost-shifting: a pure “deep-pocket” approach, and a theory that because a participant in an administrative proceeding seeks a governmental privilege, he may be required to defray the costs of needy intervenors in the same proceeding.

cently declared that courts may not invoke this doctrine without express statutory authority,³¹ and one federal court of appeals has extended this prohibition to cover involuntary cost-shifting by administrative agencies.³²

Even if Congress provided such statutory authority, the private attorney general rationale is of limited usefulness as a means of stimulating widespread public participation. Since cost-shifting requires some administrative participants to bear both their own costs and those of others, invocation of the private attorney general theory should be confined to those situations in which intervenors force other participants to comply with a clearly and narrowly defined legislative policy.³³ Cost-shifting, and the public participation which it might stimulate, will thus be unavailable in a large number of administrative proceedings.

B. Intra-Agency Public Representation

A variety of proposals assign to federal agencies themselves the affirmative duty of ensuring that the public is represented in their decision-making. The agency's role in these proposals may range from supplying its staff attorneys to represent selected intervenors³⁴ to designating agency personnel who are to identify important "public" concerns or opinions and present them in agency proceedings.³⁵

A critical shortcoming common to these proposals is that any additional information and viewpoints which reach agency decision-makers are filtered through staff members subject to pressure both from inside the agency and from the regulated industry.³⁶ This shortcoming is apparent, for example, in the Civil Aeronautics Board's Office of Consumer Advocate, whose independence rests solely on the assurances of the Board's Chairman and General Counsel, and whose participation is limited to "appropriate" proceedings subject to Board approval.³⁷ Further, agency programs which provide institutional representation of the "public interest" tend to bring a single set of additional information and viewpoints

³¹ *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

³² *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

³³ *Agency Assistance*, *supra* note 7, at 1824-25.

³⁴ Cramton, *supra* note 3, at 545; Murphy & Hoffman, *supra* note 3, at 402-08.

³⁵ Murphy & Hoffman, *supra* note 3, at 404-05.

³⁶ Cramton, *supra* note 3, at 544; Gellhorn, *supra* note 3, at 397.

³⁷ Murphy & Hoffman, *supra* note 3, at 403-05.

to a proceeding, rather than the many different ones which would more accurately reflect the pluralism of opinion which makes up the "public interest."

C. *Federal Public Advocacy Agency*

Another method of increasing public participation in administrative proceedings is the establishment of a separate federal agency to represent the public's interest in administrative matters. Generally speaking, this agency will represent positions which it finds, after an evaluation of the needs and views of the general public, to be important and currently inadequately represented.³⁸ Assignment of this responsibility to an independent federal agency encourages the development of consistent policy positions based on a nationwide perspective and the continued advocacy of these positions in administrative forums.³⁹

If may be difficult for a federal public interest advocate to remain politically independent.⁴⁰ Moreover, the federal advocate will leave a great deal of potentially valuable information and viewpoints unrepresented to federal administrative agencies. At times the advocate will decline to take part in a proceeding in which several interested groups would like to participate but lack the necessary funds. And when the federal advocate does participate in a proceeding, it will usually present only one additional set of information and viewpoints, as was the case with the intra-agency public advocate.

D. *Legal Services For Intervenors*

Several proposals have been advanced which would eliminate high attorneys' fees as a barrier to administrative participation by making legal services available to potential intervenors unable to pay for them. These arrangements have the distinct advantage of enabling intervenors to speak for themselves, thus assuring vigorous and uncompromised presentations of their positions.

The first of these methods would create a system of government-funded legal aid offices providing administrative counsel to potential intervenors.⁴¹ However, such a scheme would involve a large addition to the federal bureaucracy and would require substantial

³⁸ *Agency Assistance*, *supra* note 7, at 1821; Gellhorn, *supra* note 3, at 398.

³⁹ Gellhorn, *supra* note 3, at 398.

⁴⁰ Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1103-04 (1971).

⁴¹ Gellhorn, *supra* note 3, at 397; Cramton, *supra* note 3, at 541-42.

appropriations. This approach has yet to be incorporated into a specific proposal.

A second method suggests that private attorneys donate legal services to public intervenor groups.⁴² Regular programs of such assistance might be developed through various bar associations.⁴³ However, no comprehensive scheme for increasing public participation can be built upon such largesse alone.⁴⁴ As one attorney engaged in *pro bono* work remarked, "law firm resources will not even come close to meeting the need."⁴⁵

E. Direct Agency Compensation of Intervenors

A final means of increasing public representation before administrative agencies is direct agency payment of the costs incurred by selected intervenors.⁴⁶ This scheme retains the feature that intervenors speak for themselves. In addition, compensation will be available in a wide range of administrative proceedings,⁴⁷ and may be awarded to several intervenors in the same proceeding. As a result, a variety of public information and viewpoints can reach numerous administrative decision-makers.

In the absence of an explicit statutory declaration, the authority for federal agencies to compensate intervenors must be found in each agency's broad statutory mandate. Agencies have differed about whether they possess such authority. For example, in 1971, the FTC acknowledged its responsibility to ensure that impoverished respondents obtain counsel.⁴⁸ Two years later, the Comptroller General of the United States decided that the FTC could pay the transcript, travel and witness costs of needy respondents and intervenors, on the theory that "the use of Commission appropriations to assure . . . full preparation of cases by impecunious litigants would constitute a proper exercise of administrative discretion re-

⁴² Gellhorn, *supra* note 3, at 395. Private attorneys frequently donate their services to various clients; such work is designated as *pro bono publico* (for the public good).

⁴³ See *Committee Report*, *supra* note 15, at 39 (reference to a program currently being developed by the Federal Communications Bar Association).

⁴⁴ COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW* 281-306 (1976).

⁴⁵ *Administrative Hearings*, *supra* note 3, at 61 (testimony of Samuel Berger).

⁴⁶ Grounds for selection is an important, disputed issue, analyzed in text at notes 74-97, *infra*.

⁴⁷ The agency cost-shifting and federal public advocate schemes reach only a limited number of proceedings. See text at notes 32 and 40-41, *supra*.

⁴⁸ *American Chinchilla Corp.*, 76 FTC 1016, 1037 (1969).

garding the expenditure of appropriated funds."⁴⁹ In 1974 Congress enacted legislation to guide the FTC's exercise of this power.⁵⁰

By contrast, the Federal Power Commission has squarely denied that it has the authority to compensate intervenors, and in *Greene County Planning Board v. FPC*⁵¹ the court refused to order the FPC to do so. Initially, the Nuclear Regulatory Commission⁵² also disavowed any authority to award such compensation,⁵³ but in 1975 it reexamined this position in a rulemaking proceeding.⁵⁴ In response to an NRC inquiry, the Comptroller General issued a decision in February, 1976, which followed the approach of the 1972 FTC opinion and stated that the NRC, in the exercise of its administrative discretion, could compensate interested parties whose participation the agency considered necessary to the discharge of its statutory duties.⁵⁵ The Comptroller General's interpretation of the NRC's authority was consistent with that of both Congress⁵⁶ and the agency itself.⁵⁷ The decision did not compel, but merely allowed the NRC to compensate intervenors, and was therefore consistent with *Greene County*.

Thus a legal theory has developed that federal administrative agencies, exercising their broad residual powers to achieve regulatory objectives, may compensate needy intervenors with agency funds.⁵⁸ This theory received strong support in a letter written by the Comptroller General to Representative John Moss in May, 1976,⁵⁹ which declared that the rationale of the Comptroller's NRC decision allowing agency compensation was equally applicable to nine additional federal agencies, including the Environmental Protection Agency and the Federal Power Commission. The Court of

⁴⁹ Letter from Elmer B. Staats, Comptroller General, to Myles J. Kirkpatrick, Chairman, Federal Trade Commission, B-139703 (July 24, 1972), reprinted in *Administrative Hearings*, *supra* note 3, at 281.

⁵⁰ 15 U.S.C. § 57a(h) (Supp. V 1975).

⁵¹ 455 F.2d 412, 426 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

⁵² Until 1974, the Atomic Energy Commission.

⁵³ See *Citizens For A Safe Environment v. AEC*, 489 F.2d 1018 (3d Cir. 1974).

⁵⁴ 40 Fed. Reg. 37056-57 (1975).

⁵⁵ Decision of the Comptroller General, B-92288 (Feb. 19, 1976), reprinted in *Administrative Hearings*, *supra* note 3, at 283.

⁵⁶ H.R. CONF. REP. NO. 93-1445, 93d Cong., 2d Sess. 37 (1974).

⁵⁷ *Consumers Power Company*, RAI-74-11-820 (Nov. 20, 1974) (Dkt. No. 50-155).

⁵⁸ See *Agency Assistance*, *supra* note 7, at 1827-30.

⁵⁹ Letter from R.F. Keller, Comptroller General, to Rep. J. Moss, Chairman, Oversight and Investigations Subcomm. of the House Comm. on Interstate and Foreign Commerce, B-180224 (May 10, 1976).

Appeals for the Second Circuit recently ordered the FPC to reevaluate its denial of authority to compensate intervenors in light of the Comptroller General's pronouncement, holding that "the FPC now appears to have authorization to pay intervenors' expenses" under its general statutory mandate.⁶⁰

The Comptroller General's letter, however, urged Congress to pass legislation to guide the crucial agency decisions of whether and how to compensate intervenors.⁶¹ The Second Circuit also noted that comprehensive legislation in this area may be necessary.⁶² In the absence of such legislation, the status and form of agency compensation of intervenors will remain unsettled and uneven. A comprehensive legislative program for agency compensation of intervenors would ensure regular exposure of all administrative decision-makers to beneficial public participation and would guide prospective intervenors currently faced with a crazy-quilt of pronouncements by federal officials on the availability of compensation. S. 2715⁶³ attempted to meet this important need.

IV. IMPLEMENTING THE COMPENSATION APPROACH: S. 2715

The provisions of S. 2715 cover not only compensation of intervenors by administrative agencies, but also compensation by federal courts of parties seeking judicial review of agency actions. The bill would amend the Administrative Procedure Act (APA)⁶⁴ by adding a § 558a providing for administrative compensation and a § 707 covering judicial compensation.⁶⁵ Each of these programs would be funded for a three year experimental period, with \$10,000,000 per fiscal year authorized for administrative compensation and "such sums as may be necessary" to provide for judicial compensation.⁶⁶ The proposed § 558a provides a focal point for the examination of the following major issues:⁶⁷ (1) the scope of the agency compensa-

⁶⁰ *Greene County Planning Bd. v. FPC*, Nos. 76-4151 and 76-4153, slip op. at 827-28 (2d Cir., Dec. 8, 1976) (footnote omitted) [hereinafter cited as *Greene County II*]. See 45 U.S.L.W. 2319 (1977).

⁶¹ Letter from R.F. Keller, *supra* note 59.

⁶² *Greene County II*, *supra* note 60, at 829 n.6.

⁶³ S. 2715, 94th Cong., 2d Sess. (1976). See note 15, *supra*.

⁶⁴ 5 U.S.C. §§ 551 *et seq.* (1970).

⁶⁵ The plan for agency compensation is set forth in Section Two of S. 2715; judicial compensation is dealt with in Section Three.

⁶⁶ S. 2715, Section Five.

⁶⁷ S. 2715 addresses more facets of the agency compensation problem than can adequately be treated here. Numerous specific matters remain, *e.g.*, the question of how an agency shall allocate its funds among its various proceedings, which is discussed in Boasberg *Report*, *supra* note 18, at 195-201.

tion method; (2) the criteria for eligibility of intervenors; (3) problems of administration; (4) the availability of judicial review of compensation decisions; and (5) the possibility of delay caused by the compensation program.

A. Scope

The scope of agency compensation defines the kinds of proceedings in which compensation will be available. Debate in this area centers on whether adjudicatory proceedings should be included within the scope of a compensation program. S. 2715 provides that all rulemaking, ratemaking, and licensing proceedings, and "such other proceedings involving issues which relate directly to health, safety, civil rights, the environment, and the economic well being of consumers in the marketplace," are included.⁶⁸ Critics charge that public intervenors have no place in adversarial proceedings⁶⁹ and point out that the FTC's current statutory authority to award compensation⁷⁰ is limited to rulemakings.

The resolution of this question should turn not on which label is applied to a proceeding, but on whether additional public information or viewpoints is needed. When the issues of a proceeding involve policy or precedent of consequence to the general public, the decision-maker will benefit from the additional facts and unique viewpoints which affected public participants can supply.⁷¹

S. 2715, indeed, follows this prescription. Rulemaking, ratemaking, and licensing proceedings, all of which are included within the scope of the bill's program, are almost always of considerable consequence to the general public. Moreover, by allowing compensation in any "other proceedings" involving issues which "relate directly" to several broad areas of public concern,⁷² the bill ensures that additional public information and viewpoints will be presented whenever there is a substantial connection⁷³ between the public's welfare

⁶⁸ S. 2715, Section Two, § (b)(2) of the proposed APA § 558a.

⁶⁹ *Operations Hearings*, *supra* note 3, at 25 (testimony of Joseph Swidler) and 47 (testimony of William Cuddy).

⁷⁰ 15 U.S.C. § 57a(h)(1) (Supp. V 1975).

⁷¹ This view is in harmony with that of the Administrative Conference of the United States and other commentators. *Public Participation in Administrative Hearings, Recommendation 28, 2 RECOMMENDATIONS & REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 35 (1970-72)*; Gellhorn, *supra* note 3, at 369-71; Murphy & Hoffman, *supra* note 3, at 397.

⁷² See text at note 68, *supra*. The areas mentioned in S. 2715 encompass most important public issues and give needed guidance to those making decisions concerning compensation.

⁷³ Clearly the phrase "relate directly" is not meant to refer only to the immediacy of the

and the issues involved in an adjudication. Absent such a connection, the public consequences of administrative action are small, and the need for participation is accordingly diminished.

B. Eligibility

The eligibility of an intervenor for administrative compensation depends upon satisfaction of two requirements: the applicant's contribution to the agency proceeding and his need for judicial assistance. Statutory guidelines for agency compensation of intervenors should establish specific minimum standards to measure compliance with these basic requirements.⁷⁴

1. Applicant contribution

Under the standard established by S. 2715, compensation is appropriate if:

the person represents an interest the representation of which contributed or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests.⁷⁵

The report of the Senate Judiciary Committee on S. 2715 attempts to explain how this standard is to be applied. The agency is to consider the quality of the applicant's (actual or expected) presentation, and is to award compensation if the applicant's representation of an interest would "assist the agency in reaching a fair determination" of issues which are of "some complexity," of "significant public concern," and "not already adequately represented" in the proceeding.⁷⁶

This proposed statutory standard for eligibility has been criticized as too permissive. Critics claim that the current eligibility

relationship between the issues at hand and the five public concerns mentioned. The phrase also encompasses the strength of the relationship. See *Committee Report*, *supra* note 15, at 18.

⁷⁴ Because of financial constraints, agencies may find it impossible to compensate all applicants who meet the minimum statutory requirements, and must then exercise their discretion to compensate those applicants whose participation contributes most to the administrative proceeding. Detailed analysis of how an individual agency should allocate its funds among various proceedings or among eligible intervenors within one proceeding is beyond the scope of this article.

⁷⁵ S. 2715, Section Two, § (d)(1) of the proposed APA § 558a.

⁷⁶ *Committee Report*, *supra* note 15, at 19.

criteria for compensation for the FTC are narrower and more appropriate.⁷⁷ The FTC is authorized to compensate any person who represents an interest

- (i) which would not otherwise be adequately represented in such proceedings, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole.⁷⁸

Regulations promulgated by the FTC pursuant to this statute specify two factors to be considered in deciding whether representation is "necessary"—the "number and complexity of the issues involved" in the proceeding and "the importance of a fair, balanced representation of all interests" therein.⁷⁹

Although the criteria of S. 2715 appear to be somewhat more permissive than those currently governing the FTC's awards of compensation, the Committee Report on S. 2715 and the FTC regulations show that in practice the two standards will be effectively the same. The factors to be taken into account in applying the "substantial contribution" test of S. 2715 are nearly identical to those which the FTC considers in determining whether an applicant's participation is "necessary" and not duplicative of other parties' presentations.

Neither of these two standards, however, provides an entirely appropriate measure of the advisability of compensating an applicant, for neither one effectively tests the contributions which an applicant might make to the administrative process. Both standards turn on the identification of the "interest" represented by an applicant. Yet frequently several applicants representing the same general "interest" will seek to present very different sets of information or viewpoints, each of which would be valuable to the administrative decision-maker. Both tests instruct the awarding agency to assess the importance of an applicant's participation. However, they set out factors which are often irrelevant to this assessment. For example, a public intervenor may have information which would be vital to the determination of a given issue, even if that issue is not very "complex."

If the primary contribution of a public participant consists of

⁷⁷ See, e.g., *Operations Hearings*, *supra* note 3, at 8 (statement of Sen. Allen).

⁷⁸ 15 U.S.C. § 57a(h)(1)(A) (Supp. V, 1975).

⁷⁹ 16 C.F.R. § 1.17(d)(1) (1976).

information and viewpoints, then this should be the sole benchmark of eligibility. The awarding agency should be directed by statute to consider whether an applicant "has adequately presented or can adequately present relevant information or viewpoints not otherwise presented in the proceeding."⁸⁰ This proposed standard states clearly how the awarding agency is to determine eligibility, and it limits eligibility to those intervenors whose participation can lead to more responsive administrative decisions.⁸¹

2. *Applicant financial need*

S. 2715 poses alternative tests of an applicant's financial need. One test asks an applicant to demonstrate his financial inability to participate effectively.⁸² The other asks whether the economic interest of the individual applicant (or, if the applicant is a group, the separate economic interests of a substantial majority of its members) is small in comparison to the costs of effective participation.⁸³ This test, the Committee Report explains,⁸⁴ is intended to allow participation by those whose economic stake is so small as not to justify their paying for intervention.

Criticism has been levelled at these criteria, again on the grounds that they are too lenient. Critics allege that the first test does not provide specific devices to assure agencies of the actual financial condition of applicants,⁸⁵ and that the second test will allow "rich" intervenors to receive compensation.⁸⁶ The current statutory criteria applicable to the FTC are again claimed to be narrower and more desirable. To receive funds from the FTC, an applicant must be "unable effectively to participate" because it "cannot afford to pay" the costs of participation.⁸⁷ FTC regulations set forth several factors

⁸⁰ The requirement of an "adequate" presentation is imposed only to ensure presentations understandable by the decision-maker.

⁸¹ In practice, the FTC often looks beyond the "interest" represented by an applicant, basing its decision of eligibility on the applicant's actual "contribution to the record." Conversation with Bonnie Naradzay, Special Assistant for Compensation, Federal Trade Commission (Nov. 18, 1976). The "substantial contribution" test of S. 2715 should be applied in a similarly realistic manner. Statutory language like that suggested in the text would explicitly direct all agencies to take such a functional approach.

⁸² S. 2715, Section Two, § (d)(2)(B) of the proposed APA § 558a.

⁸³ *Id.* § (d)(2)(A).

⁸⁴ *Committee Report*, *supra* note 15, at 19-20.

⁸⁵ *Cf. Operations Hearings*, *supra* note 3, at 9 (statement of Sen. Allen).

⁸⁶ *Operations Hearings*, *supra* note 3, at 9 (statement of Sen. Allen) and 57-8 (testimony of John Low).

⁸⁷ 15 U.S.C. § 57a(h)(1)(B) (Supp. V, 1975).

to be used in determining whether an applicant can afford to participate, including the resources of the applicant, the costs of participation compared with the economic stake of the applicant's interest, and the ability of the applicant to obtain contributions from other parties.⁸⁸ The regulations also require an applicant to provide information relating to these three factors in its application.⁸⁹

Since the Committee Report calls upon agencies to look to "objective indicators" of an applicant's financial resources,⁹⁰ and the agencies are granted authority by S. 2715 to establish regulations to carry out its provisions,⁹¹ it follows that agencies will establish financial reporting requirements for applicants. Some may require more searching submissions than are currently required by the FTC. Thus administrative application of the first test of financial need under S. 2715 is not necessarily any more susceptible to abuse than the current FTC practice.

Evaluation under the first test of the financial resources of an organization regularly engaged in advocacy before federal agencies poses a particularly difficult problem. On the one hand, agencies can demand that an organization in good faith allocate a portion of its funds for its advocacy activities. On the other hand, agencies must recognize that such groups are often capable of contributing to a greater number of proceedings than their budgets permit.⁹² These considerations must be balanced in light of the overall goal of eliciting beneficial participation which, without compensation, would be unavailable. The Committee Report on S. 2715, accordingly, instructs agencies to consider both the size of an applicant group's advocacy budget and the number of other proceedings in which it is engaged,⁹³ but it warns that "it is not intended that a person must deplete its resources in order to qualify for an award."⁹⁴

Even if an applicant has substantial resources, it may be eligible for compensation under S. 2715 under the "economic stake" test discussed above. The FTC regulations contain a provision which would allow an award under similar circumstances. This test, mea-

⁸⁸ 16 C.F.R. § 1.17(d)(1) (1976).

⁸⁹ *Id.* § 1.17(c)(4).

⁹⁰ *Committee Report, supra* note 15, at 20.

⁹¹ S. 2715, Section Two, § (h)(1) of the proposed APA § 558a.

⁹² See *Administrative Hearings, supra* note 3, at 44-48 (prepared statement of Peter Shuck, discussing the inability of Consumers Union to afford participation in numerous administrative proceedings).

⁹³ *Committee Report, supra* note 15, at 20.

⁹⁴ *Id.*

suring "relative," as opposed to "absolute," economic need,⁹⁵ recognizes that the high costs of participation often pose such serious economic obstacles that even intervenors who are not impoverished are disinclined to participate.⁹⁶ When an awarding agency finds that such disinclination does in fact exist, it should award compensation if valuable participation will be elicited.⁹⁷

C. Administration

1. Timing of agency actions

The timing of the decisions concerning applicant eligibility and amount of award and the timing of the actual disbursement of funds are important aspects of any system of agency compensation. Under S. 2715 decisions on eligibility and award must be made prior to the commencement of any proceeding, unless the agency makes an explicit written finding that a prospective decision is impracticable.⁹⁸ Actual disbursement is to be made after a proceeding.⁹⁹ If, however, an eligible intervenor shows that its ability to participate will be impaired unless it receives immediate funds, an agency must make advance payment to that intervenor.¹⁰⁰

Retrospective decisions concerning eligibility and amount of award have the advantage of allowing the awarding agency to evaluate an intervenor's actual contribution to a proceeding.¹⁰¹ However, few public intervenors can be expected to proceed in light of the risk that the very expenses which otherwise deter their participation will not be defrayed.¹⁰² It would thus appear that prospective decisions on eligibility and amount of award are essential to promote widespread public participation. S. 2715 so provides.

Retrospective disbursement of funds is an effective safeguard against agency spending for contributions which never material-

⁹⁵ See Citizens VOICE Report, *supra* note 8, at 53.

⁹⁶ See Committee Report, *supra* note 15, at 20 (giving example of telephone customers, no one of which has sufficient economic stake in a ratemaking proceeding to participate therein).

⁹⁷ Compensation will generally not be appropriate when an applicant would be willing to pay the costs despite a minute economic stake. Of course, the awarding agency must also consider whether an applicant qualifies for assistance under the other test of eligibility. See text at notes 92-94 *supra*.

⁹⁸ S. 2715, Section Two, § (f)(1) of the proposed APA § 558a.

⁹⁹ *Id.* § (f)(2).

¹⁰⁰ *Id.* § (f)(3).

¹⁰¹ Boasberg Report, *supra* note 18, at 174-77.

¹⁰² This point was made repeatedly by citizens groups at the *Administrative Hearings*, *supra* note 3, *e.g.*, at 23 (testimony of Kathleen Bonk).

ize.¹⁰³ Still, some groups will be unable to bear the costs of participation without actual advance funding, even if they know that compensation awaits them at the end of the proceeding.¹⁰⁴ By allowing actual payment in advance only upon a showing of need, S. 2715 accommodates such impoverished groups, but leaves open the possibility that groups who do receive advance funding will misuse this privilege. S. 2715 provides, however, that any group shall be liable for repayment of its award if it "clearly has not provided the representation for which the . . . award was made" or has acted in an "obdurate, dilatory, mendacious or oppressive manner."¹⁰⁵ Although the groups receiving advance funding arguably will be those most unable to repay an award,¹⁰⁶ several factors ensure the program's integrity. First, any intervenor will recognize that serious injury to its reputation as a responsible public advocate—and therefore to its ability to receive compensation in future proceedings—would result from being required to repay an advance award. Intervenors will accordingly make every reasonable effort to contribute significantly to a proceeding. Second, irresponsible groups with no concern for their reputation will probably be unable initially to convince the awarding agency that they can contribute to a proceeding, and will in any case be few in number.¹⁰⁷

Both agency and intervenor would benefit if the awarding agency were required by law to state, in its written determination of eligibility, the contribution which it expects the applicant to make. Such a requirement would ground any subsequent controversy over the intervenor's performance in a written record, eliminating the chance of mistaken expectation on both sides. Indeed, the FTC's regulations call for the execution of an agreement between the Commis-

¹⁰³ *Operations Hearings*, *supra* note 3, at 47 (testimony of William Cuddy).

¹⁰⁴ See *Boasberg Report*, *supra* note 18, at 174-75.

¹⁰⁵ S. 2715, Section Two, § (f)(4) of the proposed APA § 558a. Intervenors who have been declared eligible but have not received any money shall forfeit all or part of their awards upon the same grounds. *Id.*

¹⁰⁶ *Operations Hearings*, *supra* note 3, at 10 (statement of Sen. Allen).

¹⁰⁷ The good faith of intervenors has been the subject of considerable disagreement. Compare *Administrative Hearings*, *supra* note 3, at 18 (statement by United States District Court Judge Charles Richey that intervenor groups are "among the finest that we have at the bar") with *Operations Hearings*, *supra* note 3, at 25 (statement by Joseph Swidler that, in order to obtain compensation, large, wealthy public-interest organizations "can always spin off a new group which could take the poverty oath."). In any case, the number of unprincipled, opportunistic intervenors will not be very large. The FTC has not encountered any significant problem of lack of good faith among its applicants. Conversation with Bonnie Naradzay, Special Assistant for Compensation, Federal Trade Commission (Nov. 18, 1976).

sion and any applicant setting forth "the terms and conditions of the compensation."¹⁰⁸

2. *Computation of awards*

S. 2715 provides that awards for "reasonable attorneys' fees, experts' fees, and other costs of participation" shall be based on the "prevailing market rates for the kind and quality" of services furnished.¹⁰⁹ This is a familiar standard often employed by courts in fee-shifting cases.¹¹⁰ Its use by administrative agencies disbursing money from their own coffers, however, raises the question of whether some maximum should be set on the hourly rates for attorneys' or experts' fees. The absence of a ceiling may invite abuse of the compensation program.¹¹¹ At the same time, the limit should not be set unrealistically low so that attorneys will, in effect, be financially penalized for representing public intervenors rather than more wealthy groups.¹¹²

The purpose of a system of agency compensation is to bring beneficial public participation to as many administrative proceedings as possible. Whenever an award is made, therefore, it must be sufficient to enable the intervenor to develop and present all of its information and viewpoints in an understandable, effective fashion. As long as this condition is met for each proceeding, a ceiling on attorneys' and experts' rates would allow the agency to spread the limited amount of money available for compensation to a greater number of proceedings than would otherwise be possible.

Indeed, the Committee Report on S. 2715 advocates a ceiling,¹¹³ but finds that "changing market and overall economic conditions" make it impossible to set fixed amounts that would be "equitable in all circumstances and in all sections of the country."¹¹⁴ The report

¹⁰⁸ 16 C.F.R. § 1.17(e)(1) (1976).

¹⁰⁹ S. 2715, Section Two, § (f)(5) of the proposed APA § 558a.

¹¹⁰ *E.g.*, *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd on other grounds, sub nom.* *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975); *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973). Another common standard is that set forth in the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(1) (1970). *See, e.g.*, *Wyatt v. Stickney*, 344 F. Supp. 387, 410 (M.D. Ala. 1972).

¹¹¹ *See Operations Hearings, supra* note 3, at 58 (testimony of John Low).

¹¹² *Administrative Hearings, supra* note 3, at 50 (testimony of Tersh Boasberg) and 121 (testimony of William Ruckelshaus).

¹¹³ *Committee Report, supra* note 15, at 24-25.

¹¹⁴ *Id.* at 25.

implies that by requiring that awards of attorneys' and experts' fees be "reasonable," S. 2715 intends to establish a limitation on the hourly rates.¹¹⁵ This definition of the word "reasonable," however, is contrary to the intent apparent from the face of the statute. Thus, while the statutory standard of "[r]easonable attorneys' fees . . . based upon prevailing market rates" would seem to permit an award of \$300 for two hours of work by a senior partner in a major urban law firm, the committee specifically intends that such a result be prevented.¹¹⁶

The fact that S. 2715 provides for an initial three-year experimental period should allay concern over the effect of changing economic conditions on the fairness of any specific limitation. Maximum hourly rates could be established which would ensure that a reasonable variety of skilled attorneys and expert witnesses would be available to intervenors over the entire three-year period.¹¹⁷ Regional variations in attorney and expert witness charges can be equitably accommodated by consideration of the "prevailing market rates" in various geographical areas.

3. *Identity of the awarding party*

Another important question to be asked concerning the administration of a system of agency compensation is who shall determine the eligibility of applicants and the amounts of compensation to be awarded. An obvious choice for this role is the presiding officer of each administrative proceeding,¹¹⁸ who is in an excellent position to evaluate the benefits of an intervenor's participation. However, there exists the danger that a short-sighted officer will bar intervenors through prejudgment of the case.¹¹⁹ Further, the presiding officer may be open to the charge of using his or her choice of intervenors deliberately to shape the conduct or outcome of a proceeding.¹²⁰ If compensation decisions were made or subject to review by an independent office within each agency,¹²¹ these problems might be elimi-

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 24.

¹¹⁷ These rates should not be equal to the highest prices which private practitioners command, but rather should be set only as high as necessary to provide intervenors a reasonable range of qualified attorneys and experts.

¹¹⁸ See Boasberg Report, *supra* note 18, at 201-02.

¹¹⁹ Citizens VOICE Report, *supra* note 8, at 47.

¹²⁰ *Id.*

¹²¹ A specific proposal for such an office at the FPC is set forth in Citizens VOICE Report, *supra* note 8.

nated. Such a system, however, would be costly and would add another bureaucratic layer to the agency's administrative structure.

The FTC's current practice combines these approaches.¹²² The presiding officer of a proceeding makes initial findings concerning the eligibility of applicants, and these findings are forwarded to the Director of the Commission's Bureau of Consumer Protection for review and determination of the amounts to be awarded. In this way an existing agency office provides for review of the presiding officer's decisions without adding an expensive and cumbersome administrative appendage.

A presiding officer should not have final control over who shall participate in a proceeding. Lacking sufficient appropriations to establish an office either to make compensation decisions or to review those of the presiding officer, the agencies can use existing offices within their structures for this purpose. However, since not all agency structures will be adaptable, legislation on agency compensation must explicitly attempt to deter abuse of the presiding officer's decision-making power in two other ways—by establishing clear standards for eligibility and by providing for judicial review of these decisions.

D. Judicial Review

The threshold issue concerning judicial review of agency compensation decisions is whether such review should take place at all. Although intervenors' appeals will be costly to the agencies,¹²³ this disadvantage can be mitigated by establishing a narrow standard for review of agency action, *e.g.*, "abuse of discretion,"¹²⁴ which will discourage such appeals.¹²⁵ Thus, while agencies will be allowed necessary discretion in making compensation decisions, an important check will exist against gross misconduct on their part. S. 2715, in explicitly providing for judicial review of agency compensation,¹²⁶ establishes narrow standards for that review. These standards, enumerated in § 706(2) of the APA¹²⁷ are consistent with the need to check agency misconduct while maintaining desired flexibility.¹²⁸

¹²² 16 C.F.R. § 1.17(d) (1976).

¹²³ *Agency Assistance*, *supra* note 7, at 1836.

¹²⁴ 5 U.S.C. § 706(2)(A) (1970).

¹²⁵ *Agency Assistance*, *supra* note 7, at 1836.

¹²⁶ S. 2715, Section Two, § (g) of the proposed APA § 558a.

¹²⁷ See *Committee Report*, *supra* note 15, at 26.

¹²⁸ 5 U.S.C. § 706(2) (1970) states that a court shall:

The interrelated issues of the timing of, and the remedies available under, such judicial review, raise particularly difficult questions. A balance must be struck between protecting the orderly functioning of the administrative process and making timely, effective means of redress available to aggrieved intervenors. Prompt judicial review can be achieved by defining all agency compensation decisions as "final" and therefore immediately appealable,¹²⁹ and effective vindication of an appellant's rights may require the reviewing court to exercise jurisdiction over the underlying administrative proceeding for which compensation was sought. The administrative process can be protected by denying to appellant intervenors those remedies which would unreasonably interfere with the underlying administrative proceeding.

S. 2715, following this approach, provides for review of any agency action which denies an award or the payment of an award, which grants an award which is insufficient to enable an intervenor to participate effectively, or which actually pays to an intervenor an amount insufficient to compensate its participation.¹³⁰ However, S. 2715 specifically prohibits all reviewing courts from entering an order to stay the underlying administrative proceeding in which the appellant had applied for compensation,¹³¹ thus avoiding the severe disruptive effect of a stay.¹³² If the underlying administrative proceeding is still in progress when a court decides an appeal in an aggrieved intervenor's favor, it will be sufficient to remand the case to the agency with directions to compensate the intervenor for its

hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence [in those instances in which a hearing is required]; (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Subsections (A) and (C) are those most likely to be involved in review of agency compensation decisions. The narrowness of the "abuse of discretion" standard is clear. *See* K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 29.00 (1976). So long as the statute commits compensation to agency discretion, courts can be expected to respect this legislative intent in reviewing agency action under subsection (C). S. 2715 intends to allow for such discretion. *See Operations Hearings, supra* note 3, at 13 (testimony of Sen. Kennedy).

¹²⁹ Without such a definition, appeal of an agency's action concerning compensation would probably have to await the agency's substantive decision in the underlying proceeding. *See generally* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹³⁰ S. 2715 Section Two, § (g) of the proposed APA § 558a.

¹³¹ *Id.*

¹³² *See generally* *Sampson v. Murray*, 415 U.S. 61, 83 (1974).

participation. If, however, the underlying proceeding has been concluded by the time the court reaches a decision, the appropriate remedy will be for the reviewing court to direct the agency to reopen the proceeding and incorporate into its substantive considerations the presentation for which the intervenor is entitled to receive compensation.¹³³

E. Delay

The possibility of administrative delay due to agency compensation presents another important matter for consideration. Two kinds of administrative delay which might be caused by agency compensation of intervenors have been invoked by critics of S. 2715.¹³⁴ One type of delay results from the time spent in making agency decisions concerning eligibility and amount of award. Agencies can minimize this time by developing streamlined procedures for compensation decisions. For example, agencies can develop standardized application forms, perhaps requiring a statement of financial resources made under oath. Significantly, the FTC has not experienced substantial delay in processing applications for compensation, and the delay that has occurred is expected to diminish as the agency and the applicants become more accustomed to the compensation process.¹³⁵

A second kind of delay might occur in the administrative proceedings themselves when compensated intervenors participate. This delay would be caused in large part by intervenors pressing frivolous claims. The FTC has not encountered a substantial number of such intervenors.¹³⁶ In addition, well-designed criteria for eligibility, combined with a statutory requirement that frivolous intervenors must forfeit or repay their awards, will avoid wasteful participation. Of course, some delay in administrative proceedings will result from the mere presence of a greater number of participants. Agencies can minimize this delay in several ways. Through modernization of their

¹³³ Agencies are often directed by reviewing courts to amass a more complete record. *Cf.* *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1971); *Kelley v. Weinberger*, 391 F. Supp. 1337, 1344 (N.D. Ind. 1974) (agencies directed on remand to develop a more complete record, where participants' lack of counsel or lack of effective counsel prevented this during the original proceedings).

¹³⁴ *Operations Hearings*, *supra* note 3, at 18-19 (testimony of Joseph Swidler) and 46 (testimony of William Cuddy).

¹³⁵ Conversation with Bonnie Naradzay, Special Assistant for Compensation, Federal Trade Commission (Nov. 18, 1976).

¹³⁶ *Id.*

procedural rules, agencies could expedite parties' handling of matters both before and during administrative hearings.¹³⁷ Moreover, in making their decisions concerning eligibility and amount of award, agencies can deliberately avoid duplicative or superfluous presentations in a proceeding. The Committee Report on S. 2715 lists several "flexible approaches" to compensation which would serve this purpose, including joint compensation of applicants with similar contributions.¹³⁸ Agencies could use the written determination of their reasons for an award to define the precise role an intervenor is allowed to play in a proceeding.¹³⁹

Even though increased delay will surely result from agency compensation of intervenors, it will be offset somewhat by the fact that increased public participation will cause the development of a more complete administrative record. Incomplete records often lead to judicially ordered rehearings of administrative proceedings—a source of considerable delay.¹⁴⁰

CONCLUSION

None of the issues discussed above can be resolved with complete ease. Some disadvantages accompany any legislative program. However, the preceding analysis shows that a system of agency compensation can be designed which minimizes these drawbacks and brings a wide range of beneficial public information and viewpoints before administrative decision-makers. The statutory scheme established by S. 2715 represents such a system. Specific improvements to that scheme have been suggested here—most importantly, the establishment of a standard for eligibility which directly tests the contribution of additional information or perspective which the potential intervenor might make.

Direct agency compensation of intervenors promises to achieve widespread, beneficial public participation in administrative proceedings. Such participation is needed to improve the quality of administration which so affects our lives, especially our environment. A statutory system along the lines outlined above would be a welcome development.

¹³⁷ The FTC is in the process of modernizing its rules on discovery and compulsory process. 41 Fed. Reg. 21793 (1976) (to be codified in 16 C.F.R. Part 3). See also Murphy & Hoffman, *supra* note 3, at 399.

¹³⁸ *Committee Report*, *supra* note 15, at 21.

¹³⁹ See text at notes 107-08, *supra*.

¹⁴⁰ *Administrative Hearings*, *supra* note 3, at 57 (testimony of Tersh Boasberg).